



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC CASE NO. 764 OF 2012

REBECCA CHEPKOECH LAGAT.....PLAINTIFF

VERSUS

WILLIAM KIBOR LAGAT.....DEFENDANT

RULING

This ruling is in respect of an application dated 13th June 2019 brought by the defendant/applicant seeking for the following orders:

- a) That the court be pleased to stay execution of judgment delivered on 8th April 2019 pending the hearing of this application inter partes.
- b) The court be pleased to order stay of execution of the judgment delivered on 8th April 2019 pending the determination of the appeal.

APPLICANT'S CASE

The applicant filed submissions on 16th December 2019 and relied on the provisions of Order 42 rule 6.

Counsel cited the case of Antoine **Ndiaye v African Virtual University [2015] eKLR** on the issue of substantial loss. It was Counsel's submission that if the plaintiff is registered as a proprietor of the suit land then it would mean that the plaintiff would enjoy the rights of a proprietor including the power to lease, charge and alienate the said land thereby putting the defendant in jeopardy if the appeal succeeds. That it would be difficult to recover the suit land.

On the issue as to whether the application was filed without undue delay, counsel submitted that judgment was delivered on 8th April 2019 and the applicant filed the notice of appeal on 16th April 2019 and served a copy on the respondents' advocates. Further that the application was filed on 13th June 2019, a period of 2 months after judgment.

Counsel submitted that the power of ordering for security is discretionary and relied on the case of **Focin Motorcycle Company Co. Limited v Ann Wambui Wangui & Another [2018] eKLR** and submitted that the applicant was willing to provide any security as the court directs. He therefore urged the court to allow the application as prayed as the applicant has met the threshold of Order 42 Rule 6 of the Civil Procedure Rules.

RESPONDENT'S CASE

Counsel filed submissions and stated that the applicant has not annexed a copy of the memorandum of appeal which shows he has not thought of issues to appeal on and has no triable issues he wants to appeal on. That the applicant filed the application after the 30 days' stay had elapsed and the applicant is guilty of unreasonable delay. He does not stand to suffer irreparable harm as he has never occupied the suit land at any given time. The respondent has had uninterrupted possession of the suit land from 1965.

Counsel further submitted that the applicant has not tabled any material evidence to show what substantial loss he stands to suffer. The applicant has not offered any security for the performance of the decree. Respondent.

ANALYSIS AND DETERMINATION

The issues for determination in an application for stay of execution are as provided for under Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub rule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

(3) Notwithstanding anything contained in sub rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

If an applicant satisfies the above then a stay order can be granted. In the case of Stephen Wanjohi...Vs...Central Glass Industries Ltd, Nairobi HCC No.6726 of 1991, the Court held that: -

“For the court to order a stay of execution there must be: -

- i. Sufficient cause
- ii. Substantial loss
- iii. No unreasonable delay
- iv. Security and the grant of stay is discretionary”.

The applicant has stated that he will suffer substantial loss if the stay is not granted as the import of the judgment is to the effect that the respondent will be registered as an owner who will have all the rights that appertains to ownership including transacting, leasing, transferring or charging the property.

How does a person prove substantial loss? It is not enough for a party to claim that he or she will suffer substantial loss without going a step further to demonstrate this loss. In the case of Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR Mativo J dealt with the issue of substantial loss as follows:

“The corner stone of the jurisdiction of the court under Order 42 of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted. What constitutes substantial loss was broadly discussed by Gikonyo J in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto where it was held inter alia that: -

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein vs. Chesoni, the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”

A party must endeavour to prove to the court that if the stay is not granted then the ensuing state of affairs will make him suffer substantial loss which will negate the essence of an appeal. The Court of Appeal in the case of Charles Wahome Gethi v Angela Wairimu Gethi, Civil Appl. No. 302 of 2007 [2008] eKLR held that:

“... it is not enough for the applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the applicants stand to suffer if the Respondent executes the decree in this suit against them.”

Having said that I find that the applicant has not demonstrated the substantial loss that he will suffer. The applicant does not live on the suit land and even if he was living on the suit land, that would not be sufficient ground to allow a stay of execution.

On the issue as to whether the application has been brought without undue delay, judgment was delivered on 8th April 2019 and the application was filed on 13th June 2019. This was a period of 2 months. Further, it was 30 days after stay had lapsed. I find that the applicant filed the application timeously.

On the issue of provision of security for the due performance of the decree, the applicant has offered to abide by any conditions as to security as the court may order. **In the case of Arun C Sharma -V- Ashana Raikundalia T/A Rairundalia & Co. Advocates** Justice Gikonyo the Court stated that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

Further in the case of **Kiraita Abuta v Richard Nyandika Nyangoya [2019] eKLR** the court referred to the case of **Elena D. Korir vs Kenyatta University** where Justice Nzioki wa Makau had this to say: -

“the application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & another vs Thornton & Turpin Ltd where the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag JA) held that “The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- Sufficient cause, Substantial loss would ensue from a refusal to grant stay, The applicant must furnish security, the application must be made without unreasonable delay.”

In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo vs Straman EA Ltd (2013) as follows: -

“In addition the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other.”

The court proceeded to find that the applicant had not proven that he would suffer substantial loss as he did not prove that he lived on the suit property.

In the case of **Equity Bank Limited v Taiga Adams Company Limited [2006] eKLR** the court stated as follows: -

“The pre-amble to sub-rule (2) of Rule 4 of Order 41 is couched in very clear language and words: “No order for stay of execution shall be made under sub-rule (1) unless....” then follows the requirements, above, which have not been met by the applicant herein.

Let me conclude by stressing that all the four, not one or some, must be met before this court can grant an order of stay.”

The conditions as provided for under Orders 42 Rule 6 must be met before the court exercises its discretion in favour of the applicant. In the exercise of this discretion the court must be alive to the fact that the same must be exercised judiciously so as not to cause any injustice to either of the parties.

The court must also do a balancing act taking into consideration the rights of a successful litigant and that of the applicant who would like to try his/her luck in the superior court. That is why there is a hierarchy of courts, whereby if you are dissatisfied with the outcome in one court you are at liberty to move to the next court.

I find that the applicant will not suffer any substantial loss if the decree is implemented and therefor the application is dismissed. In the interest of justice, I will order that the respondent upon registration of the title in her name should not part with possession or charge the property pending the hearing and determination of the intended appeal.

DATED and DELIVERED at ELDORET this 18TH DAY OF FEBRUARY, 2020

M. A. ODENY

JUDGE

RULING read in open court in the presence of Mr.Keter for Defendant/Applicant and in the absence of Kimaru Kiplagat & Co. for the Plaintiff/Respondent.

Mr. Yator – Court Assistant